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February 11, 1998

The Honorable William E. Kennard, Chairman
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, DC 20554

Re: Telecommunications Carriers' Use of
Customer Proprietary Network Information
and Other Information, CC Docket No. 96-115

Dear Chairman Kennard:

I want to take this opportunity to express again AT&T's views as to the importance for consumers of construing Section 222(c)(1) of the Telecommunications Act of 1996 ("Act") to allow a one-time notice and opt-out form of approval to enable carriers to use customer proprietary network information ("CPNI") for marketing purposes where such approval is required.

The statutory language is not only consistent with, but invites, this interpretation. To be sure, Section 222(c)(1) requires customer "approval" to use CPNI for marketing other than "telecommunications service." However, Congress obviously intended approval under (c)(1) to be something other than "affirmative written" approval, which is what is required under 222(c)(2) when a customer wants to direct a carrier to disclose his or her CPNI to a third party. Had Congress intended written approval, it would have used language in (c)(1) that is identical to that in (c)(2). Any form of approval in writing is necessarily an affirmative written one, so requiring written approval under (c)(1) would not be consistent with Congressional intent and would be adding a requirement that Congress specifically left out. Thus, under Section 222(c)(1), the Commission should allow carriers to use either a "verbal" or "notice and opt-out" approval, depending on what is most appropriate for the circumstance.

A one-time notice and opt-out approach gives consumers the appropriate safeguards and control over how

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a carrier may use their information. As the Commission has tentatively concluded, "customers must know that they can restrict access to their CPNI obtained from their use of a telecommunications service before they waive that right, in order to be considered to have given approval."¹ For some customers, a written notice is preferable to a telephone contact soliciting verbal approval. Accordingly, for purposes of Section 222(c)(1), the Commission could require that carriers provide a one-time written notification to all customers, with a negative "opt-out" approval. Following notification of CPNI rights and absent customer direction to the contrary, carriers would be permitted to use CPNI for marketing non-telecommunications services. As the Commission has recognized, this approach, which places the responsibility on the customer to direct that CPNI not be used (rather than on the carrier to obtain consent for use), is far preferable to obtaining positive customer consent.² The "opt-out" approach is not only substantially more cost-effective and avoids the very real possibility that a carrier's ability to use CPNI would be inadvertently restricted through customer inaction, but it also maximizes consumer benefits from the development of innovative new products and services and the availability of increased information about those services.

In addition, the Commission should specify that a one-time notice for existing customers, rather than a periodic notice, is adequate.³ For new customers, the

¹ Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, Notice of Proposed Rulemaking, 11 FCC Rcd. 12513, ¶ 28 (1996).

² Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 3 FCC Rcd. 1150, 1163 (1988) ("Computer III Reconsideration Order") ("Another advantage to the existing CPNI rule for enhanced services is that it places the burden of responding to the . . . CPNI notice on what will probably be the minority, rather than the majority of users.")

³ As for AT&T, a nondominant interexchange carrier, there is no longer any competitive reason to poll large, multiline business customers annually as to whether they wish to restrict internal use of their CPNI. Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 2 FCC Rcd. 3072, 3096 (1987). Rather,

notice could be obtained at sign-up, in the welcome package or the initial bill, or at whatever time the carrier intends to use CPNI in a circumstance when "approval" would be required. In all events, carriers should be permitted the flexibility to provide notice verbally and simultaneously with a carrier's attempt to seek approval for CPNI, as well as in advance of such use, either verbally or in writing.

Moreover, notice and opt-out approval is consistent with the Commission's long-standing view that customers' privacy interests are not compromised by broad use of business information and that such use promotes consumer welfare. The Commission has repeatedly and expressly found that broad use of CPNI within a single integrated firm does not raise significant privacy concerns,⁴ and that consumers would not object to having their CPNI disclosed within a firm to increase the competitive offerings made to them.⁵ To the contrary, the Commission has determined that privacy rights are not adversely affected when a customer receives a marketing contact from a firm with whom it has a voluntary, established business relationship.⁶ And, marketplace forces provide competitive telecommunications firms with the proper incentives to use customer information in a responsible manner, and they have no ability to discriminate against their rivals. Certainly, there is nothing inconsistent with an "opt-out" approach and Section 222(c)(1)'s "approval" requirement. Although opt-out approval is a negative one, the Commission can, consistent with its prior rulings, infer "approval" for

(footnote continued from previous page)

these customers should be treated similarly to residential and small business customers, for whom neither AT&T (nor even the former Bell Operating Companies ("BOCs")) have either a notification or prior authorization requirement under Computer III. See Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd. 7571, 7610-11 (1991) ("Computer III Remand Order").

⁴ Computer III Remand Order, 6 FCC Rcd. at 7611 n.159.

⁵ Computer III Reconsideration Order, 3 FCC Rcd. at 1163.

⁶ The Telephone Consumer Protection Act of 1991, 7 FCC Rcd. 2736, 2738 (1992).

use of CPNI to market telecommunications service from the customer's informed participation in the customer-carrier relationship. Opt-out approval ensures customers know their CPNI right and can control a carrier's use of CPNI by withdrawing consent for use of CPNI for any purpose other than telecommunications service.

Although AT&T also supports and has been soliciting verbal approvals from customers, this form of approval is not only significantly more costly, but AT&T cannot use it for all customers. Approximately one-third of AT&T's residential customers are on company maintained do-not-call lists or have nonpublished telephone numbers which in some states may restrict our ability to contact them by telephone. Accordingly, if a notice and opt-out approach were not available, then the only option would be for AT&T to send these customers a direct mail solicitation requiring an affirmative response from the customer, either in writing or by calling a toll-free number. According to the Commission, a "prior authorization rule would vitiate a [carrier's] ability to achieve efficiencies through integrated marketing to smaller customers" and would, as a practical matter, deny to all but the largest business customers the benefits of "one-stop shopping" and integrated marketing because "a large majority of mass market customers are likely to have their CPNI restricted through inaction."⁷

Although, with limited exceptions, Section 222 does not apply differing requirements on various categories of carriers, Sections 272 and 274 impose explicit additional nondiscrimination obligations on the BOCs. In the Non-Accounting Safeguards Order, the Commission expressly determined that the nondiscrimination requirements of Section 272 extend to CPNI.⁸ The Commission also held that Section 272(c)(1) imposes an unqualified nondiscrimination obligation more stringent than the "unjust and unreasonable" discrimination prohibition of Section 202(a), with the result that the "BOCs must treat all other entities in the same manner in which they treat their section 272 affiliates."⁹ Indeed, the Commission has already

⁷ Computer III Remand Order, 6 FCC Rcd. at 7610 n.155.

⁸ Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489, released December 24, 1996, ¶¶ 202, 222 ("Non-Accounting Safeguards Order").

⁹ Id. at ¶¶ 16, 197.

concluded that under Section 272(c)(1) a BOC must provide to unaffiliated entities the same goods, services, and information that it provides to its Section 272 affiliate at the same rates, terms and conditions.¹⁰ The joint marketing provisions of Section 272(g) do not alter these obligations because access to BOC CPNI is not a component of marketing or sales activity.¹¹

Taking Sections 222 and 272 together, a BOC cannot use, disclose or permit access to CPNI of its customers, directly or indirectly, for the benefit of its Section 272 affiliate, unless the CPNI is made available to all competing entities on nondiscriminatory terms. Thus, if a BOC were to use CPNI without customer consent (or any form of consent other than the affirmative written consent that a third party would need to obtain and use a customer's BOC CPNI), it must disclose the CPNI to all other entities desiring access to it on the same terms and conditions. By contrast, if the Section 272 affiliate obtains express written consent (in the same manner any other unaffiliated third party could), then the BOC may disclose CPNI to its Section 272 affiliate without disclosing it to unaffiliated entities. This latter approach protects customer privacy and puts the Section 272 affiliate in the same position as an unaffiliated third party, thereby ensuring compliance with Section 272(c)(1)'s nondiscrimination obligation. A similar analysis pertains under Section 274 to the use, disclosure and access to BOC CPNI in connection with electronic publishing.

¹⁰ Id. at ¶ 202.

¹¹ Section 272(g)(3) means only that if a BOC sells or markets its Section 272 affiliate's services, it need not sell or market the long distance services of unaffiliated carriers. It does not exempt use of BOC CPNI from Section 272(c)(1)'s nondiscrimination requirement. Id. at ¶ 222.

In short, AT&T urges the Commission to give carriers the intended flexibility under Section 222(c)(1) to serve their customers' requirements by enabling them to offer new and innovative products and services appropriately tailored to meet specific customers' telecommunications needs. At the same time, it should enforce the BOCs' nondiscrimination obligations under the Act.

Respectfully yours,

A handwritten signature in black ink, reading "Rick D. Bailey". The signature is written in a cursive, flowing style with a large initial "R".

cc: The Honorable Harold Furchtgott-Roth
The Honorable Susan Ness
The Honorable Michael Powell
The Honorable Gloria Tristani
FCC Secretary's Office